

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11	TONY CLEMONS,)	Case No. CV 11-02702 DDP (JCGx)
12)	
12	Plaintiff,)	ORDER DENYING MOTIONS TO DISMISS
13)	AND GRANTING MOTIONS TO CONTINUE
13	v.)	AND WITHDRAW AS COUNSEL
14)	
14	KELLER WILLIAMS REALTY,)	[Docket Nos. 33, 34, 39, 50]
15	INC., LUCKY CATS, INC., et)	
15	al.)	
16)	
16	Defendants.)	
17)	
17)	
18	_____)	

Presently before the court are: 1) Defendants M.D. Webb & Associates & Jeff Book's Motion to Dismiss First Amended Complaint; 2) Defendants Litton Loan Servicing, L.P. & HSBC Bank USA, N.A.'s Motion to Dismiss First Amended Complaint; 3) Plaintiff Tony Clemons' Motion to Continue Trial Date and All Related Pretrial Dates; and 4) Defendants Litton Loan Servicing, L.P. & HSBC Bank USA, N.A.'s Motion to Withdraw as Counsel. Having reviewed the parties' moving papers, the court denies both Motions to Dismiss, grants the Motions to Continue and Withdraw as Counsel, and adopts the following Order.

1 **I. BACKGROUND**

2 Plaintiff Tony Clemons ("Clemons") first filed suit against
3 some of the current Defendants in California state court on
4 December 23, 2010. Those Defendants removed the action to federal
5 court on March 30, 2011. On October 28, 2011, the court granted
6 Clemons' unopposed Motion for leave to file a First Amended
7 Complaint ("FAC"). Clemons filed his FAC on November 14, 2011,
8 adding Defendants Jeff Book ("Book"), M.D. Webb & Associates
9 ("Webb"), Litton Loan Servicing, L.P. ("Litton"), and Alice McHugh
10 ("McHugh"), who Clemons learned of through the initial Defendants'
11 Federal Rule of Civil Procedure 26(a)(1) disclosures. Defendants
12 McHugh and HSBC Bank USA, N.A. ("HSBC") each filed answers to the
13 FAC in December 2011. Defendants Book and Webb, and Litton and
14 HSBC, (collectively, "moving Defendants") then filed their
15 respective Motions to Dismiss in January 2012. Also in January
16 2012, Clemons filed his Motion to Continue, and Litton and HSBC
17 filed their Motion to Withdraw as Counsel.

18 In his FAC, Clemons alleges four causes of action: 1) race
19 discrimination in violation of the California Fair Employment and
20 Housing Act ("FEHA"), Cal. Gov. Code § 12900 et seq.; 2) race
21 discrimination in violation of the federal Fair Housing Act
22 ("FHA"), 42 U.S.C. § 3601 et seq.; 3) race discrimination in
23 violation of equal rights under the law, 42 U.S.C. § 1981; and 4)
24 intentional interference with prospective economic relations.

25 As alleged in the FAC, Clemons is "by race and appearance an
26 African American male," and a U.S. military veteran. In July 2009,
27 Clemons submitted an offer to purchase a home in Los Angeles,
28 California with a \$289,000 listing price. Clemons had been pre-

1 approved for a \$300,000 loan by the U.S. Department of Veterans
2 Affairs ("VA"). Clemons submitted the offer through his realtor,
3 Michael Hamilton ("Hamilton"), "who is also an African American"
4 and employed by "a predominantly African American real estate
5 firm." Clemons and Hamilton then "came into contact" with
6 Defendants Paul Azdril ("Azdril") and McHugh, the selling agents of
7 the property, employed by Defendant Lucky Cats, Inc. ("Lucky
8 Cats"). (FAC ¶¶ 4, 19-23.)

9 From July to August 2009, Clemons and Hamilton submitted five
10 offers on the home. Defendants "ignored or refused" each of the
11 offers. At some point during "negotiations," Clemons learned "that
12 the property needed certain repairs, which [Clemons] would be
13 unable to perform under the terms and conditions of the VA loan."
14 Specifically, the VA loan "required that repairs be made by the
15 seller prior to purchase." Therefore, on August 2, 2009, Clemons
16 increased his offer by \$2,500 to cover the cost of repairs - for a
17 total offer of \$281,500. On August 5, 2009, "Azdril responded that
18 the seller did not want to make the repairs to the property and
19 rejected [the offer]." On August 6, 2009, Clemons emailed a letter
20 to Defendant Anna Shady ("Shady"), "the Regional Operations Manager
21 of Keller Williams Realty" ("Keller"), identifying himself as an
22 "African American male." Shady responded that she would work "with
23 the Market Center owned by Lucky Cats, Inc. to follow-up with
24 [Clemons'] previous offers." (FAC ¶¶ 24-28.)

25 Around the same time, however, Defendants reduced the listing
26 price of the home from \$289,000 to \$259,000 - \$22,500 less than
27 Clemons' August 2, 2009 offer. Clemons then submitted two or three
28 more offers on the home, adjusted to the new listing price.

1 Defendants refused the offers "with little or no explanation." In
2 November 2009, Defendants sold the home "to two persons with
3 Hispanic last names for \$264,000" - \$17,500 less than Clemons'
4 August 2, 2009 offer. The buyers "financed the purchase with an
5 FHA mortgage that required repairs similar to the repairs that had
6 been required by [Clemons'] VA mortgage." Clemons therefore
7 contends that Defendants unlawfully rejected his purchase offers
8 "because of discrimination based on his race," and that Defendants
9 Keller, Lucky Cats, Shady, Azdril, and Rick Cunningham interfered
10 with his "prospective economic relations" with property owner HSBC.

11 **II. MOTIONS TO DISMISS**

12 **A. LEGAL STANDARD**

13 Federal Rule of Civil Procedure 12(b)(6) requires courts to
14 dismiss claims for which no relief can be granted. When
15 considering a 12(b)(6) motion, "all allegations of material fact
16 are accepted as true and should be construed in the light most
17 favorable to the plaintiff." Resnick v. Hayes, 213 F.3d 443, 447
18 (9th Cir. 2000). In Ashcroft v. Iqbal, the Supreme Court explained
19 that a court should first "identify[] pleadings that, because they
20 are no more than conclusions, are not entitled to the assumption of
21 truth." 129 S. Ct. 1937, 1950 (2009). Next, the court should
22 identify the complaint's "well-pleaded factual allegations, . . .
23 assume their veracity and then determine whether they plausibly
24 give rise to an entitlement to relief." Id.; see also Moss v. U.S.
25 Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) ("In sum, for a
26 complaint to survive a motion to dismiss, the non-conclusory
27 factual content, and reasonable inferences from that content, must
28 be plausibly suggestive of a claim entitling the plaintiff to

1 relief." (internal quotation marks omitted)); Mejia v. EMC
2 Mortgage Corp., No. CV 09-4701, 2011 WL 2470060, at *5 (C.D. Cal.
3 June 16, 2011) ("The standards for pleading discrimination claims
4 are no higher than the relaxed notice pleading standard of Fed. R.
5 of Civ. Pro. 8(a)." (citing Swierkiewicz v. Sorema N.A., 534 U.S.
6 506, 512 (2002), and Edwards v. Marin Park, Inc., 356 F.3d 1058,
7 1062 (9th Cir. 2004))).

8 **B. DISCUSSION**

9 Absent "circumstantial evidence of discriminatory motive," a
10 plaintiff establishes a prima facie FEHA case by showing that: 1)
11 "she is a member of a protected class"; 2) "she applied and was
12 qualified for a housing accommodation"; 3) "she was denied such
13 housing accommodation"; and 4) "similarly situated individuals not
14 in a protected class applied for and obtained housing." McDonald
15 v. Coldwell Banker, 543 F.3d 498, 503 (9th Cir. 2008). The
16 standard is the same for Clemons' FHA claim. See id. at 505 & n.7
17 ("With respect to the FHA claim, the standard of proof and analysis
18 applied in a disparate treatment case are the same as those applied
19 in a FEHA case."). Similarly, the elements of a § 1981 claim are:
20 "(1) plaintiff is a member of a protected class; (2) plaintiff
21 attempted to contract for certain services; and (3) plaintiff was
22 denied the rights to contract for those services." Mejia, 2011 WL
23 2470060, at *6 (citing Lindsey v. SLT Los Angeles, LLC, 447 F.3d
24 1138, 1145 (9th Cir. 2006)).

25 In their nearly identical Motions to Dismiss, Defendants Book
26 and Webb, and Litton and HSBC, argue that Clemons fails to
27 adequately allege: 1) any discriminatory acts they committed; 2)
28 their knowledge of Clemons' race; and 3) that Clemons was a

1 qualified purchaser. The court disagrees. Although Clemons could
2 have provided additional details - which Clemons sets forth in his
3 Opposition and exhibits - his FAC still meets the minimal pleading
4 standards of Federal Rule of Civil Procedure 8(a). As discussed,
5 Clemons alleges that each of the Defendants ignored or refused his
6 offers, including an offer for \$281,500, then reduced the listing
7 price to \$259,000, and finally sold the home to buyers with
8 Hispanic last names for \$264,000. Clemons thereby adequately
9 alleges potentially discriminatory acts by moving Defendants.

10 As to Defendants' knowledge of his race, Clemons alleges that
11 he first submitted an offer in July 2009, through his African
12 American realtor working at a predominantly African American real
13 estate firm. Clemons further alleges that he and his realtor then
14 "came into contact" with the property's selling agents. Finally,
15 before Defendants refused Clemons' last offers, Clemons informed
16 Defendant Shady - a manager for Defendant Keller - that he was
17 African American. Accordingly, while Clemons does not expressly
18 plead moving Defendants' knowledge of his race, it is reasonable to
19 infer that they may have learned of his race from the other
20 Defendants involved in the managing and sale of the property.

21 As to the "qualified" purchaser element, moving Defendants
22 correctly note that this requires a plaintiff to "meet the terms of
23 the seller." See McDonald, 543 F.3d at 503. Here, Defendants
24 claim that Clemons never offered to meet the seller's term that the
25 seller not be required to make any repairs to the property.
26 Defendants argue that this case is therefore identical to McDonald,
27 where the court held that a plaintiff was not a qualified
28

1 purchaser, because her offers included a "seller carryback"
2 provision that the seller had made clear he would not accept.

3 In McDonald, however, a divided Ninth Circuit panel affirmed a
4 grant of summary judgment by the district court. In doing so, the
5 majority found that it was an "undisputed fact . . . that the
6 seller refused to engage in a seller carryback provision." Id. at
7 504; see also id. at 502 (finding that the selling agent and broker
8 "had not done seller carrybacks for years and felt it was not
9 necessary in their market"). The dissent, to the contrary, would
10 have found that the alleged refusal of the seller to engage in any
11 carryback was "sufficiently disputed," and therefore reversed the
12 grant of summary judgment. Id. at 509 n.5 (Hawkins, J., concurring
13 in part and dissenting in part); see also id. at 508 ("In
14 concluding that the seller 'refused to engage in a seller carryback
15 provision,' the majority contradicts the seller's own testimony.");
16 id. at 507 (finding that, even adjusting for the "alleged defect,"
17 plaintiff's "offer was still equivalent to the ultimate selling
18 price"); id. at 502 n.1 (majority opinion) (rejecting the dissent's
19 contention that carrybacks were a "condition common to residential
20 real estate transactions").

21 In short, the outcome of McDonald depended on the majority's
22 acceptance of a finding at summary judgment that the seller's
23 reason for refusal - i.e. the term he required for a qualified
24 purchase - was not genuinely disputed. Such a finding, however,
25 would be inappropriate here at the motion to dismiss stage, where a
26 reasonable inference from Clemons' FAC is that Defendants' alleged
27 requirement for a qualifying purchase was pretextual. As
28 discussed, Clemons claims that Defendants responded to his \$281,500

offer, including \$2,500 to cover repairs, by reducing the listing price \$30,000 and ultimately selling the property for \$17,500 less than his offer. The timing and size of these reductions therefore call into question Defendants' purported justification that the seller was in fact entirely unwilling to make repairs - indeed, so much so, that the seller was willing to risk and eventually accept tens of thousands of dollars less for the property. Of course, once the facts are in, it may become clear that the alleged requirement of "no seller repairs" was a genuine term of purchase, and that Clemons was therefore not a qualifying purchaser. But the court cannot resolve this potential factual dispute now, when it must still take as true all of Clemons' allegations and the reasonable inferences therefrom.¹ The court therefore denies the moving Defendants' Motions to Dismiss.

III. MOTIONS TO CONTINUE AND WITHDRAW

Clemons moves to continue the trial date and all related pretrial dates, as certain Defendants recently were served with the FAC and filed the instant Motions to Dismiss. Fact discovery then closed on February 1, 2012. The court finds good cause to grant the Motion. See Fed. R. Civ. P. 16(b)(4). Although Clemons could have been more prompt, he was sufficiently diligent in amending his

¹ Defendants Litton and HSBC also appear to suggest that Clemons cannot plead discrimination claims, because the eventual buyers were also members of a protected class. (See Reply at 6 ("In addition, Plaintiff alleges that the property was sold to individuals in a protected class. Thus, Plaintiff fails to state a prima facie case under the McDonald standard.")) Such an interpretation of the elements for a discrimination claim would, of course, be absurd. Discrimination between protected classes is unlawful as well, and does not require that similarly situated individuals not belong to any group potentially discriminated against because of race, religion, gender, or other protected status.

1 Complaint to add the new Defendants, after they were identified in
 2 the original Defendants' initial disclosures. He was also then
 3 sufficiently diligent in serving the FAC and filing this Motion.
 4 Although the court is sympathetic to Defendants' concerns about
 5 ongoing reputational harm, this does not constitute sufficient
 6 prejudice here to change the analysis. The court, however, will
 7 not grant any further continuances, barring exceptional
 8 circumstances.

9 Finally, no party has filed an opposition to Defendants Litton
 10 & HSBC's Motion to Withdraw as Counsel, and the Defendants have
 11 apparently obtained new counsel. The court therefore grants the
 12 Motion.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the court DENIES Defendants Book
 15 and Webb's[33], and Defendants Litton and HSBC's, Motions to
 16 Dismiss [50]. The court GRANTS Plaintiff Clemons' Motion to
 17 Continue [34], and hereby continues the trial dates as listed
 18 below. The court also GRANTS Litton and HSBC's Motion to Withdraw
 19 [39].

20 FACT DISCOVERY CUT-OFF 05-02-12

21 EXPERT DISCOVERY CUT-OFF 07-02-12

22 LAST DAY TO FILE DISCOVERY MOTIONS 07-02-12

23 LAST DAY TO FILE DISPOSITIVE MOTIONS 07-02-12

24 FINAL PRE TRIAL CONFERENCE 09-17-12 at 11:00 a.m.

25 6 DAY JURY TRIAL 09-25-12 at 9:00 a.m.

26 IT IS SO ORDERED.

27 Dated: March 23, 2012


 DEAN D. PREGERSON
 United States District Judge